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Supreme Court of the United States

OCTOBER TERM 1965

No. **649**

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,

versus

WILLIE PEACOCK, ET AL.,
Respondents,

AND

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner,

versus

DOROTHY WEATHERS, ET AL.,
Respondents

**CROSS PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BENJAMIN E. SMITH
JACK PEEBLES of
SMITH, WALTZER, JONES & PEEBLES
1006 Baronne Building
New Orleans, Louisiana
Counsel for Cross-Petitioner**

Of Counsel:

**CLAUDIA SHROPSHIRE
507½ North Farish Street
Jackson, Mississippi
L. H. ROSENTHAL
406 Medical Building
Jackson, Mississippi**

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioners, Willie Peacock and Dorothy Weathers, et al petition that a writ of certiorari be issued to review the final judgments rendered by the United States Court of Appeals for the Fifth Circuit in causes No. 21655 and 22597 on the docket of said Court, and styled, respectively, *Willie Peacock, et al vs. The City of Greenwood, Mississippi*, hereinafter referred to as the Peacock case and *Dorothy Weathers, et al vs. The City of*

Greenwood, Mississippi, hereinafter referred to as the *Weathers* case.

OPINIONS BELOW

1. The opinions of the United States District Judge for the Greenville Division of the Northern District of Mississippi in these cases are not officially reported. A copy of the District Court opinion in the *Peacock* case appears in the Petition for Certiorari filed by the City of Greenwood, Mississippi in this Court as Appendix A and also at page 10 of the record prepared by the United States Court of Appeals for the Fifth Circuit. The *Weathers* case consisted of eighteen separate causes which were consolidated by the said District Court after judgment had been rendered, but joint opinions were written in some of these eighteen causes. In all, four opinions were rendered by said District Court in the *Weathers* case, all of which appear as Appendixes B, C, D, and E in the Petition for Certiorari in this Court filed by The City of Greenwood. There also appears as Appendix F in the Petition for Certiorari filed by The City of Greenwood that opinions of the said District Judge cited in each of the four opinions rendered in the *Weathers* case, as controlling those cases, namely, *City of Clarksdale, Mississippi vs. Gertge*, 237 F. Supp. 213 (N. D. Mississippi 1964). The copies of the opinions in Appendixes B, C, D, E, and F of the City's petition also are to be found on pages 34, 764, 789 and 862, respectively, of the record in the *Weathers* case, prepared by the United States Court of Appeals for the Fifth Circuit.

2. The opinion of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case is reported at 347 F.2d 679 (1965) and the *Weathers* case is reported at 347 F.2d 986 (1965). They appear in the Petition for

Certiorari filed by The City of Greenwood as Appendixes G and H, respectively, and are to be found at pages 29 and 873 of the respective certified records.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case was dated and entered June 22, 1965, and in the *Weathers* case was dated and entered July 20, 1965.

On petition of City an order signed by the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, dated July 23, 1965, was entered extending the time within which to file a petition for certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case to and including August 21, 1965. City's Petition for Certiorari was filed during August, 1965. On petition of Willie Peacock and Dorothy Weathers an order by the Honorable Hugo Black, Associate Justice of the Supreme Court of the United States, dated September 20, 1965 was entered extending the time within which to file a cross petition for certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the *Peacock* case to and including October 5, 1965.

The jurisdiction of this Court to review each of said judgments is conferred by 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review in both these cases are as follows:

1. Whether a showing of the denial of equal rights through the systematic exclusion of Negroes from the Grand and Petit Juries by methods other than State legislative or Constitutional provisions is sufficient to ground removal jurisdiction under 28 U.S.C. 1443(1).

2. Whether the petitions for removal herein present a basis for Federal removal under Title 28 U.S.C. 1443, subdivision (2).

3. Whether the equal protection clause of the Fourteenth Amendment and the general Civil Rights Statutes are laws "providing for equal rights" within the meaning of subdivision (2) of Title 28 U.S.C. Section 1443.

4. Whether the federal remedy of removal in subdivision (2) of Title 28 U.S.C. Section 1443 may be limited solely to federal officers or persons acting under them.

STATUTE INVOLVED

The only statute involved in this cross-petition is 28 U.S.C. Section 1443, which is as follows:

CIVIL RIGHTS CASES.

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil

rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

STATEMENT OF THE CASE

The fourteen petitioners in the *Peacock* case were all arrested on March 31, 1964, by city officials in the City of Greenwood, Mississippi and charged with violating Section 2296.5 of the Mississippi Code Annotated of 1942. Petitioners, who were all members of the Student Non-Violent Coordinating Committee, were arrested while picketing the LeFlore County Court House, and were charged with obstructing public streets. On April 3, 1964, before trial in the Police Court of the City of Greenwood, Mississippi, petitioners filed removal petitions in the United States District Court for the Northern District of Mississippi (Greenville Division), alleging jurisdiction under both sub-sections of 28 U.S.C. 1443. Petitioners alleged that they were members of the Student Non-Violent Coordinating Committee, affiliated with the Conference of Federated Organizations, both civil rights groups. Petitioners further alleged that at the time of their arrest they were engaged in a voter registration drive in LeFlore County, Mississippi, assisting Negroes to register so as to enable them to vote. After alleging that they were arrested as aforementioned, petitioners alleged that they could not enforce their rights under the First and Fourteenth Amendments of the Federal Constitution to be free in speech, to petition and to assemble, that they were denied the equal protection of the laws, the privileges and immunities of the laws

and due process of law, inasmuch as, among other things, they were arrested, charged and were to be tried under a state statute which was vague, indefinite and unconstitutional on its face, and was unconstitutionally and arbitrarily applied and used, and was enforced in the instance of their arrest as "a part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood." Because of the aforementioned, petitioners further alleged, they were denied and/or could not enforce in the courts of the State of Mississippi the rights they possess providing for equal rights of citizens of the United States and could not act under authority of the aforementioned provisions of the Federal Constitution and 28 U.S.C.A. 1971 providing for equal protection and equal rights. Petitioners invoked the application of both sub-sections of 28 U.S.C. Section 1443.

The *Weathers* case also involves criminal cases removed from the Police Court of the City of Greenwood, Mississippi under authority of 28 U.S.C. 1443, sub-sections 1 and 2. In that case there are fifteen respondents who were arrested at various times during the month of July, 1964 and charged with the following offenses: parading without a permit in violation of an ordinance of the City of Greenwood, Mississippi, enacted June 21, 1963, and recorded in Minute Book 55 at page 67 of the Records of Ordinances of the City of Greenwood, Mississippi; contributing to the delinquency of a minor in violation of Section 7185-13 of Mississippi Code Annotated of 1942; the use of profane and vulgar language in violation of Sections 2089.5 and 2291 of the Mississippi Code Annotated of 1942; disturbance in a public place; disturbing the peace in violation of Section 2089.5 of the Mississippi Code Annotated of 1942; assault; assault and

battery; inciting to riot; operating a motor vehicle with improper license tags in violation of Sections 9352-21 and 9352-24 of the Mississippi Code Annotated of 1942; interfering with a police officer in the performance of his duty; and reckless driving.

Some of the petitioners in the *Weathers* case are charged with more than one of the offenses listed above, and some of them jointly filed one petition for removal. Petitioners' petitions for removal in the *Weathers* case allege different facts, but with respect to 28 U.S.C. Section 1443(1) they allege that petitioners cannot enforce their equal civil rights under the Fourteenth Amendment in the courts of the state for the following reasons, to-wit: Mississippi courts and law enforcement officers are committed to a policy of racial segregation and are prejudiced against petitioners; under Mississippi law, custom and practice racially segregated court rooms are maintained; in Mississippi court rooms Negro witnesses and attorneys are addressed by their first names; local counsel are unavailable to petitioners and Mississippi courts are closed to out-of-state attorneys; Mississippi judicial officials are elected by elections in which Negroes have been denied the right to vote; and Negroes are systematically excluded from jury service. The petitioners also alleged that they were entitled to remove their cases to federal court under the authority of 28 USC Section 1443(2).

In both the *Peacock* and *Weathers* cases, the City of Greenwood filed motions to remand, which were sustained by the United States District Court for the Northern District of Mississippi (Greenville Division) on the grounds that the said petitions did not state a removable case under either subsection of 28 USC Section 1443.

The District Court refused to order an evidentiary hearing on the allegations of the petitions.

The petitioners in both cases appealed to the United States Court of Appeals for the Fifth Circuit, which court, after issuing a stay order in the *Peacock* case (decided before the 1964 Civil Rights Act permitted an appeal of a remand order) entered judgment in the *Peacock* case on June 22, 1965. The said Court of Appeals in the *Peacock* case affirmed the District Court's holding regarding Section 1443(2) but reversed its holding under Section 1443(1) and therefore remanded that case to the District Court for a hearing on the truth of the allegations in the petitions for removal. The Court of Appeals refused to consider petitioners' allegation that the Statute under which they were charged was vague and indefinite because the District Court did not reach the question, but held that the unconstitutional application by State officials of a State Criminal Statute valid on its face in such a manner as to violate a person's rights under the equal protection clause of the Federal Constitution is sufficient to entitle such person to remove his case to Federal Court. The Court interpreted certain Supreme Court decisions ending with *Kentucky v. Powers*, 1906, 201 U. S. 1, 50 L. Ed. 633, holding that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from Grand and Petit juries must result from State legislative or constitutional provisions. Interpreting 28 USC 1443 Subsection (2), the court held that this section is limited to Federal officers and those assisting them or otherwise acting in an official or quasi-official capacity and held that this Section does not authorize removal by any person who is prosecuted for an act committed while

exercising an equal civil right under the Constitution or laws of the United States.

On July 20, 1965 the Court of Appeals for the Fifth Circuit sustained the petitioners' motion for a summary reversal in the *Weathers* case, holding that the issues in that case were identical with and therefore controlled by the Court's opinion in the *Peacock* case.

In remanding the cases to the District Court for further hearings, the Court of Appeals decided a Federal question, namely the scope of removal jurisdiction under 28 USC Section 1443.

ARGUMENT

In its decision regarding 28 USC 1443 Subsection 1, the Court of Appeals decided an important Federal question which has not been reviewed by this Court since 1906. In its decision regarding 28 USC 1443 Subsection 2, the Court of Appeals decided an important question of Federal law which has not been, but should be settled by this Court. For the sake of brevity, and since the Court of Appeals held that the issues in the *Weathers* case are identical with those in the *Peacock* case and therefore controlled by the *Peacock* decision, argument in this petition is limited to the facts and law as stated in the *Peacock* case.

I.

A SHOWING OF THE DENIAL OF EQUAL RIGHTS THROUGH THE SYSTEMATIC EXCLUSION ■ OF NEGROES FROM GRAND AND PETIT JURIES BY METHODS OTHER THAN STATE LEGISLATIVE OR CONSTITUTIONAL PROVISIONS IS SUFFICIENT TO

GROUND REMOVAL JURISDICTION UNDER 28 USC 1443(1).

The Court of Appeals felt constrained to abide by the former decisions of the Supreme Court beginning with *Virginia v. Rives*, 1870, 100 U. S. 313, 25 L. Ed. 667, and ending with *Kentucky v. Powers*, 1906, 201 U. S. 1, 50 L. Ed. 633. The Court of Appeals held that these cases established that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from Grand and Petit juries must result from State legislative or constitution provisions. In these ancient cases, the stated rationale for this rule was that the deprivation of protected rights had to be shown in advance of trial in order to establish removal under what is now Subsection 1. However, the Court of Appeals was quick to point out that this reasoning gives way to the fact that the illegality of a Grand Jury indictment springing from systematic exclusion would be susceptible of proof prior to trial. The rationale was also advanced in these decisions that questions other than those arising from the terms of a statute should be left to State courts for vindication. Again, the Court of Appeals pointed out that this does not follow for State courts are bound under the Federal Constitution to protect a litigant from the loss of rights even in the case of express language in a State Statute. The Court felt that Federalism may have indicated that the remedy in such situations in the first instance should be left to the State courts. The Court of Appeals did not interpret these cases as establishing that the denial of equal civil rights must appear on the face of the State Constitution or Statute rather than its application where the alleged denial, as here, had its inception in the arrest and charge,

but rather these cases dealt only with the systematic exclusion question. It is submitted that, even if they affect only the systematic exclusion question, the *Rives-Powers* decisions should be re-examined by this Court, since these decisions have created a great deal of confusion in the lower Federal Courts. See *In Re: Hagewood's Petition*, 200 F. Supp. 140, 1961; *State vs. Murphy*, 173 F. Supp. 782, 1959; *City of Birmingham vs. Crosskey*, 217 F. Supp. 947, 1963; *California vs. Chue Fan*, 42 Federal 865, 1890; and *New Jersey vs. Weinberger*, 38 Fed. 2d 298, 1930.

History has amply shown that the restriction placed on 28 USC 1443(1) by the *Rives-Powers* decisions is unwarranted. An examination of the wording of the Statute and the legislative intent of its framers indicates that restrictions placed there by lower federal courts were not warranted. It is time that the Supreme Court overturned these decisions, or in the alternative, clearly limited their application.

II.

A SHOWING OF PROSECUTION IN A STATE COURT FOR AN ACT COMMITTED WHILE EXERCISING AN EQUAL CIVIL RIGHT UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES IS SUFFICIENT TO GROUND REMOVAL JURISDICTION UNDER 28 USC 1443(2).

A. The federal remedy of removal in subsection 2 of Title 28 U.S.C. sec. 1443 is not limited solely to Federal officers or persons acting under them.

The Court of Appeals for the Fifth Circuit, affirming the Federal District Court, held that petitioners failed to

state a removable claim under 28 U.S.C. sec. 1443(2) because that subsection applied only to federal officers and persons acting "in some way on behalf of government," and did not extend to persons engaged in a voter registration drive assisting Negroes to secure the right to vote as guaranteed by the Constitution and the Civil Rights Act of 1960, 42 U.S.C. sec. 1971 et seq.¹

The Fifth Circuit in reaching this conclusion first observed that sec. 1443(2) evolved from section 3 of the Civil Rights Act of 1866, 14 Stat. 27, which allowed removal of suits and prosecutions

"against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act. . . ."

Since the 1948 revision of the statute, which resulted in present section 1443, was not intended to work any substantive change in the removal provision (H.R. Rep. No. 308, 80th Cong., 1st Sess. A 134, 1947), the Court deemed the original language the best guide to the meaning of the statute.

The Court viewed Section 3 in the broad context of the entire Act of 1866. Section 1 of the Act, now 42 U.S.C. sec. 1981, declared Negroes to be citizens, conferred upon

¹The Fifth Circuit cited *City of Clarksdale v. Gerige*, 237 F. Supp. 213 (N.D. Miss., 1964) as support for its conclusion that section 1443(2) was limited in application to federal officers and persons acting under them. *Gerige* involved the prosecution of a civil rights worker for taking photographs in city hall without the mayor's permission, which was required under a city ordinance. In limiting the application of section 1443(2) the District Court cited no authority and gave no analytical treatment to considerations meriting its conclusion except a limited discussion of possible consequences of a broad construction. For these reasons it is of dubious value as authority for the Fifth Circuit construction.

them various juridical rights of citizenship, such as the ability to make and enforce contracts, and guaranteed them the

"full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to no other. . . ."²

Section 2, which was followed by the removal provision, made it a crime to deprive persons of rights secured by the Act. Sections 4-10 were devoted to compelling and facilitating the arrest and prosecution of violators of section 2.

From this point of departure, the Court concluded that the removal provision of section 3 was primarily directed at protecting federal officers attempting to enforce the provisions of the Act and that the "other person" language of section 3 referred to bystanders, the posse comitatus, and other quasi-officials pressed into service by federal officers pursuant to authority granted in sections 4-10 of the Act.

The Court supported this conclusion by construing the section 3 language "for any arrest or imprisonment,

²Act of April 9, 1866, Ch. 31, 14 Stat. 27, Sec. 1, provides:

That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous conditions of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

trespasses or wrongs done or committed by virtue or under color of authority derived from this act" to suggest "enforcement activity". The Court further observed that Congress could have said "any person" rather than "officer . . . or other person" if its intent was to allow removal by anyone exercising equal civil rights. Finally, the Court argued that section 1443 (1) would be made redundant and its denial or inability to enforce equal rights limitation subverted by a broad construction of section 1443 (2).

Petitioners contend that the Fifth Circuit's construction of section 1443 (2) is erroneous for the following reasons:

(1) The legislative history of the removal provision indicates that Congress intended that provision to have a broad reach. The manifest purpose of the Act of 1886 was to protect the equal civil rights of all persons, especially Negroes. The sole constitutional bases for the Act were the 13th Amendment and Article IV, Section 2, the Privileges and Immunities Clause. After the ratification of the 14th Amendment in 1868, Congress expanded its protection of civil rights to embrace guarantees included therein and in the 15th Amendment. The Civil Rights Acts of 1870 and 1871 safeguarded the right to vote without racial discrimination, broadened federal court jurisdiction to protect these rights, and summarily re-enacted the Act of 1866, including the removal provision.³

In 1875, the last major civil rights legislation of the century was enacted, granting Negroes equal access to

³Act of May 31, 1870, Ch. 114, 16 Stat. 140. Act of April 20, 1871, Ch. 22, 17 Stat. 13.

places of public accommodation and making federal courts its enforcement agencies. The removal provision was recodified as Section 641 of the Revised Statutes of 1875.⁴ Thereafter, Section 641 was carried forward without substantial change until it assumed its present form as section 1443 in 1948.

In light of the progressive legislative and judicial broadening of Federal Civil Rights, the Fifth Circuit's limitation of section 1443 (2) to federal officers and persons acting under them seems strained. It is unrealistic to assume that legislation granting rights which presupposes exercise by the beneficiaries would simultaneously order abstention from self-help in enforcement of these rights by effectively refusing the Freedmen protection from state tribunals and state officers attempting to subvert the exercise of equal civil rights.

(2) The language of Section 3 of the Civil Rights Act of 1866 supports petitioners' construction. The language of Section 3 of the Act of 1866 refers "other person" to the rights granted in section 1. The stated scope of section 1 plainly indicates the rights it granted and protected were not limited to those enforced by federal

⁴Section 641 Revised Statutes (1875) provides:

When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in the State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided.

officers and their appointees. It is clearly reasonable to assume that Congress preferred "federal officers . . . or other persons" to "any person" because it feared that the latter language might leave doubt that federal officers would be protected in enforcement activities, and it assumed that the courts would apply the protective provisions to beneficiaries of the rights.

(3) Technical considerations buttress petitioners' contention that section 1443 (2) extends to all persons in the exercise of their equal civil rights. The language of section 3 of the Act of 1866 applies to persons without explicit limitation to persons acting under federal officers. Such explicit limitation was put in the revenue officer provisions of that year (Act of July 13, 1866, ch. 184, 14 Stat. 98, sec. 67). Secondly, the color of authority language of subsection 2 of section 1443 and the denial language of subsection 1 were carried forward together in section 641 of the Revised Statutes of 1875. Provisions relating to federal officers were carried forward into Revised Statutes, sec. 643, in that same year. Finally, the 1948 revision of 28 U.S.C. expanded the earlier revenue-officer removal statutes to cover in section 1442(a) (1) all suits or prosecutions against any federal "officer . . . or person acting under him, for any act under color of such office."⁵ If section 1443 (2) reaches only federal officers and persons act-

⁵28 U.S.C. Section 1442(a) (1) (1948) provides:

A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of revenue.

ing under them, it is wholly tautological in the 1948 Code.

Petitioners do not contend that any of these technical considerations standing alone is conclusive. But in view of the ambiguities of the statutory language and history, petitioners contend that these considerations tip the balance in favor of a broad construction of section 1443 (2) and extension of its protection to all persons exercising their equal civil rights.

B. Petitioners are entitled to an Evidentiary Hearing under subsection (2).

The Court's ruling on sub. 1 reversed the District Court and upheld petitioners' right to preliminary evidentiary hearing to determine whether or not petitioners had been denied "equal rights" through the discriminatory and racially motivated application of a facially constitutional statute. Thus, under the Court of Appeals Opinion, the District Court *will* receive evidence on the validity of the removal under Subsection 1, but this evidence will relate *only* to improper and unconstitutional application of the Mississippi statute and petitioners' other denial or inability to enforce their equal rights in the courts of the state.

This limited and restricted evidentiary hearing DIFFERS RADICALLY from the hearing petitioners would be entitled to if the Court of Appeals had granted petitioners' right to remove under Sub. 2.

In a Subsection 2 removal hearing, petitioners would *not* be required to produce evidence of discriminatory state motivation and policy in the administration of

(facially constitutional) state law. Rather, removal could be sustained in this case on a showing that petitioners were arrested and charged for "acts (done) under color of authority derived from any law providing for equal rights" regardless of the basic motivation and racial policy of the State and state officials. In the case at bar, the affidavit and removal petition show that petitioners were members of SNCC, *actively* engaged at the time of their arrest in encouraging Negro voter registration in LeFlore County (Greenwood) Mississippi, when arrested and charged with obstructing traffic. Petitioners submit that they were exercising First Amendment rights under authority of that part of the Fourteenth Amendment which forbids the state from interfering with their activity, i. e., the "equal protection" clause.

Thus, petitioners were charged with an offense under Mississippi law, the factual elements of which are almost exactly the same as the factual elements of the activity protected under the 13th and 14th Amendments and 42 U.S.C.A., Section 1971 et seq., i. e., peaceably assisting and encouraging Negro citizens to register to vote. Upon proof at the District Court at a Subsection 2 hearing that the same conduct for which petitioners were arrested and charged by state authorities is also colorably protected by the Constitution or a specific provision of the Federal Civil Rights Act (1971 et seq.), petitioners would be entitled to removal and possibly dismissal of the state charges in the District Court, without proof of any "denial" of equal rights in the state courts.

It is therefore imperative for this Court *in advance* of the Subsection 1 evidentiary hearing now ordered by the Court of Appeals to review the removability of this

case under Sub. 2 in order to accord petitioners a full review of the removability of the state criminal proceedings at one hearing.

C. The Equal Protection Clause of the Fourteenth Amendment and the general Civil Rights Statutes are laws "providing for equal rights" within the meaning of subdivision (2) of Title 28 U.S.C. Section 1443.

Petitioners seek removal under 1443(2) on the ground that they are being prosecuted in a Mississippi State Court "for an act under color of authority derived from any law providing for equal rights. . . ." Petitioners contend that:

A. There is a state prosecution pending against them,

B. That prosecution is for an act which they did, i.e., peaceably accompanying Negroes at Greenwood, Mississippi for the purpose of assisting and encouraging them in the exercise of their right to register and vote; and

C. That their "act" in assisting Negro Voter Registration in rural Mississippi was "under color of authority derived from (laws) providing for equal rights."

Petitioners contend that the 13th and 14th Amendments intended to *and did* affirmatively grant to Negro Americans the right to exercise civil rights *equally* with white Americans, free from state denial and limitation. The Civil Rights Acts are also laws providing for "equal rights" within the meaning of sub. 2, particularly the voting rights acts as amended in 1964; 42 U.S.C.A. 2, 1971 et seq.

It is undisputed that the 14th Amendment and the Civil Rights Acts, especially Sub. 1971 et seq., are "laws providing for equal rights" particularly with regard to voting. And as the second Circuit said in *Galamason*, there is not real difference between the "equal civil rights" in sub. 1 and "equal rights" in sub. 2.

The fact is that petitioners in this case would be manifestly entitled to removal protection under 1443(2) in the case at bar unless:

1. This Court agrees with the Fifth Circuit and finds that 1443(2) limits removal to federal officials and their appointees (See Argument on Question Presented IIA, *Supra*); or

2. This Court adopts the *Galamason* interpretation of the phrase in 1443(2) "under color of authority derived from laws providing for equal rights".

Petitioners submit that *Galamason* was wrongly decided and must be clarified by this Court to avoid its growing acceptance in the lower federal courts. *Galamason* exhaustively compares the language and history of 1443(1) and 1443(2) in order to determine the appropriate scope of (2) (which was the only subsection before the *Galamason* Court).

In the course of this comparison, *Galamason* recognizes that the phrase, laws providing for "equal civil rights" and "equal rights" in each subsection refers to the 14th Amendment and the Civil Rights Acts and is identical in meaning and scope under both subsections. The Court, however, goes on to say that (assuming *arguendo*, sub. 2

applies to persons others than federal officers) sub. 2 is vastly narrower than 1. Thus, the *Galamason* Court concluded "under color of authority" in sub. 2 required the petitioner there to show that he was being prosecuted in the state court for an act specifically commanded or encouraged by federal statute. The Court held that petitioners there were *not* entitled to removal merely on an allegation that their prosecution in the state court arose out of *conduct*, constitutionally or statutorily *permitted* but not *commanded*, i.e., that the possible availability of the 14th Amendment as a civil rights act *defense* to a state court prosecution did not, standing alone, confer on the petitioner "color of authority" within the meaning of 1443(2) to do the act out of which the prosecution arose.

This argument upon which the Court's entire re-shaping of 1443(2) rests is completely erroneous and must be laid to rest as soon as possible. A broad reading of 1443(2) does *not* result in emasculation of the "denial" requirement in 1443(1), thus allowing state criminal defendants to evade the limitations of 1443(1).

For example, a Negro might be arrested in Mississippi for murder. Assuming that the killing had no racial background or overtones, the Negro defendant could not remove to the Federal Court under 1443(2) however broadly it be read since the defendant could not show that he was arrested for doing an act under color of authority derived from a law providing equal rights (murder).

But this same defendant might well remove under 1443(1) if he alleged and could show unconstitutional and discriminatory application of Mississippi State Jury Selection and impaneling laws. In this not unlikely situation,

sub. 1 is not emasculated at all by a really broad reading of sub. 2 — nor can a petitioner for removal 'evade' the denial requirement in 1 by resort to 2. In short, wherever the state criminal defendant's "act" is unprotected (eg. burglary, etc.) sub. 2 is no help at all and the petitioner must show "denial" under 1 and an affirmative unconstitutional action or motivation by state authority in order to be entitled to removal.

Where then does *Galamason* get the idea that a broad and plain reading of 2 sub. 1 when as seen, *supra*, such a reading would be immaterial to 1 in the vast majority of removal cases involving claims of "procedural" denials of equal protection? There are, of course, cases where state criminal defendants could choose either 1 or 2 (eg. the case at bar).

In the case at bar, petitioners could show both that

(a) The State was applying its laws (facially constitutional) in an invidiously discriminatory way, and

(b) That the exact act for which petitioners are prosecuted was and is protected within the meaning of sub. 2 (but note the radical difference in proofs under the joint 1 and 2 sections).

Originally, it is clear that Congress intended sub. 1 as a remedy against judicial or parajudicial denials of equal protection, i.e., as a way of securing justice for Negroes at and after the arrest regardless of the conduct that led to the arrest. Sub. 2 on the other hand was originally intended not to secure a fair trial and pre-trial procedure but to encourage constitutionally protected conduct en-

gaged in *before* arrest and conviction; eg. voting, public accommodations, etc. Historically facts supporting a sub. 1 removal would not at all necessarily or even probably support a sub. 2 removal as well.

Thus, *Galamason's* finding that sub. 2 must be radically restricted in order to preserve the "denial" requirement of sub. 1, is totally unsupported upon an analysis of the real scope of sub. 2, and upon recognition of a logical judicial widening of sub. 1.

The *Galamason* rationale for a narrow reading of sub. 2 cannot be sustained.

Respectfully submitted,

Benjamin E. Smith and
Jack Peebles of
SMITH, WALTZER, JONES & PEEBLES
1006 Baronne Building
New Orleans, Louisiana

Counsel for Cross Petitioners
for Certiorari

Of Counsel:

Claudia Shropshire
507½ N. Farish Street
Jackson, Mississippi

Leonard H. Rosenthal
406 Medical Building
Jackson, Mississippi

CERTIFICATE

The undersigned counsel of record for the Cross Petitioners, Willie Peacock and Dorothy Weathers, hereby certify that a true copy of the foregoing cross petition for certiorari has been this day forwarded by United States mail, postage prepaid, to Aubrey H. Bell, of Bell & McBee, 115 Howard Street, Greenwood, Mississippi, and Hardy Lott, of Lott & Sanders, 226 Aven Building, Greenwood, Mississippi, attorneys of record for the City of Greenwood, Mississippi, petitioners herein.

This the _____ day of October, 1965.

Benjamin E. Smith